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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 963

JOHN J. BATTERMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Sixth Circuit, and

BRIEF IN SUPPORT THEREOF.

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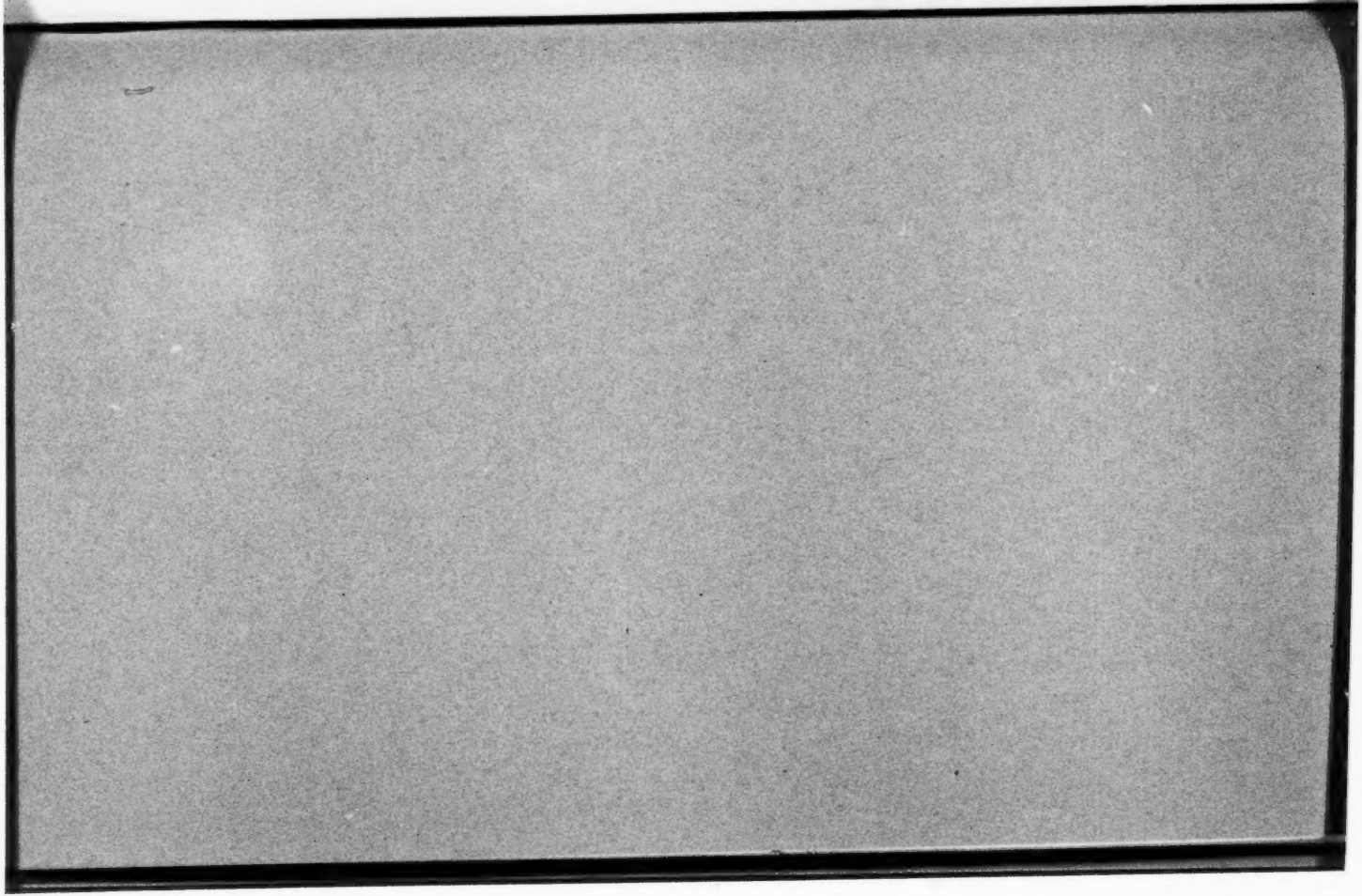

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of John J. Batterman, who also was the petitioner-appellant below, respectfully shows:

I.

(a) SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for writ of certiorari to review a judgment of the Circuit Court of Appeals for the Sixth Circuit which affirmed the judgment of the United States Board of Tax Appeals (now the Tax Court of the United States) on an appeal taken by petitioner to said Board for re-determination of an income tax deficiency asserted by respondent with respect to the income of the petitioner for the year of 1937.

(b) The facts, history of the case and statement of contentions of the parties as to basic question involved.

1. The petitioner is a resident of Cuyahoga County, Ohio, and a citizen of the 18th Taxing District (Ohio). (Stip. R. 15—Finding R. 136)
2. The respondent asserted a deficiency against the petitioner on account of income taxes for the year of 1937. (Exhibit "A"—R. 6—Stip. R. 15)
3. The taxes in controversy represent a deficiency assessed by the commissioner for the year of 1937 amounting to $11,278.29, which after credit on account of matters not in issue herein reduced the amount to $10,810.78. (Stip. R. 15—Finding R. 148)
4. The Gabriel Company was incorporated under the laws of Ohio May 1st, 1925 and has continued existing at all times since and operates a manufacturing plant, manufacturing for sale passenger automobile shock absorbers, and maintains its plant and offices in Cleveland, Ohio. (Stip. R. 15)
5. That some time prior to November, 1931 Dr. Alfred R. L. Dohme, petitioner's brother-in-law, purchased the entire issued and outstanding Class "B" common stock of The Gabriel Company, consisting of 2,000 shares which were the sole and only voting shares issued by The Gabriel Company. (Stip. R. 15—Finding R. 136)
6. Following the purchase of said entire issue of outstanding Class "B" common stock by Dr. Alfred R. L. Dohme, he having the sole voting control of The Gabriel Company, caused The Gabriel Company to enter into a contract of employment with his brother-in-law, John J. Batterman, the petitioner, which contract was dated November 16th, 1931 and provided as compensation to the petitioner for his devoting his entire time and effort to the company, $10,000.00 plus an agreed percentage of net profits. (Exhibit "B" R. 20—Stip. R. 15, 16—Finding R. 136, 137)

7. Shortly prior to the expiration of the original employment contract (Exhibit "B") the petitioner was re-employed under a new five year contract dated November 5th, 1936 between the petitioner and The Gabriel Company by which the petitioner was to receive $12,500.00 for the first year and $15,000.00 each for the remaining four years of the second contract. Both contracts were carried out by both parties, and during said ten year period (1931 to 1941) the petitioner had no other employment, but devoted his entire time, interest and effort to his position with The Gabriel Company. (Exhibit "C" R. 23—Finding R. 136, 137—Stip. R. 16)

8. Said increased compensation was accounted for by reason of Dr. Dohme causing his brother-in-law, John J. Batterman, the petitioner, to be elected to the Presidency and General Managership of The Gabriel Company, which caused him to have full and complete charge of the management and operation of said corporation, The Gabriel Company. (Stip. R. 16—Finding R. 136)

9. The Gabriel Company had sustained operating losses for some years prior to 1936, and in that year was in poor financial condition, and needed additional capital. (Petitioner's testimony R. 85—Finding R. 137)

10. In December of 1936 the shares in question had a book value of $2.61 per share, and the following are the high and low stock market prices of said stock for the respective years set opposite such quotations:

Year	*High*	*Low*
1935	5-3/8	7/8
1936	7-3/8	3-3/4
1937	7-1/2	1-1/8
1938	3-7/9	1-1/4
1939	3-1/4	1-1/2

and the respective losses of said company for the same years are as follows:

Year	*Loss*
1935	$41,976.00
1936	77,368.00
1937	18,359.00
1938	55,101.00
1939	27,732.00

and the number of shares dealt in on the New York Stock Exchange were as follows:

Year	*No. of Shares*
1937	141,420
1938	60,300
1939	53,600

11. That during the week in which the stock was transferred by Dr. Dohme to the petitioner, to-wit: February 23rd, 1937 there were sales of 2800 shares of The Gabriel Company stock reported on the New York Stock Exchange, and on said date of issuance, to-wit: February 23rd, 1937, shares of The Gabriel Company were sold on the New York Stock Exchange at a price of 5⅜ which is the price used by the Commissioner in determining the deficiency assessed which is one of the issues in this action. (Stip. R. 90)

12. That prior to the reorganization hereinafter referred to, The Gabriel Company had issued and outstanding a Class "A" preferred, non-voting stock of 198,000 shares and 2,000 shares of Class "B" common stock which had sole voting control, and all of which was owned by Dr. Alfred R. L. Dohme. The corporation had no other preference stock or funded debt. (Stip. R. 17—Finding R. 137)

13. In January, 1936 a plan of reorganization of the capital structure of The Gabriel Company was discussed with Dr. Dohme by the petitioner and executives of The Gabriel Company, and upon recommendation of the executives, including the petitioner, H. M. Preston & Company, a firm of finan-

cial experts and engineers who had many years' experience in reorganizing corporations, was employed to make a survey of the company's condition, and to make recommendations. (Stip. R. 16—Finding R. 137)

14. The survey resulted in a recommendation that H. M. Preston & Company be permitted to prepare a plan of reorganization of The Gabriel Company capital structure (Finding R. 137); that such recommendation of H. M. Preston & Company to The Gabriel Company provided, among other things for—

(a) An increase and change of the Class "A" non-voting shares from 198,000 to 300,000 voting shares.

(b) That Dr. Dohme surrender for cancellation his 2,000 shares of the Class "B" voting common stock and that this class of stock be withdrawn.

(c) That in consideration thereof Dr. Dohme receive 40,000 shares of the increase in new Class "A" voting stock.

(d) That the remaining shares of the new 300,000 shares is to be sold to the public for the purpose of raising additional capital for the corporation. (Stip. R. 17—Finding R. 137)

15. Following contact between The Gabriel Company and H. M. Preston & Company in December, 1935, in January of 1936, the petitioner and his wife and R. Hosken Damon, attorney for H. M. Preston & Company, discussed the matter with Dr. Dohme in Florida, where it was arranged that Dr. Dohme should receive 40,000 shares of the new Class "A" voting stock in consideration of his surrender and cancellation of his 2,000 shares of Class "B" voting stock, and Dr. Dohme approved the reorganization plan and agreed with H. M. Preston & Company that out of his 40,000 shares he would pay to H. M. Preston & Company in new shares, their fee for engineering and reorganization,

which fee it was agreed should not exceed one-half of the shares being received by Dr. Dohme and would be between 15,000 and 20,000 shares, and Dr. Dohme by such arrangement was to retain 10,000 shares for himself and wished to distribute to his brother-in-law and his wife, and two of his friends, officials of The Gabriel Company, the balance of said shares which ultimately amounted to 12,000 shares. (See Dohme deposition R. 122, 123)

16. In consummation of said reorganization plan approved by Dr. Dohme and the shareholders of The Gabriel Company, Dr. Dohme deposited with The Cleveland Trust Company, Cleveland, Ohio, said 2,000 shares of Class "B" voting common stock under a voting trust agreement designating Preston, Damon and the petitioner, voting trustees, and under power of said voting trust Dr. Dohme's 2,000 shares of voting stock were voted in favor of said reorganization plan. (Stip. R. 17—Finding R. 138)

17. That following adoption of said plan on May 18th, 1936 by The Gabriel Company shareholders, the reorganization proceeded to a conclusion, and on November 29th a certificate for 40,000 shares was issued to the voting trustees, which was exchanged on December 21st, 1936 for a certificate for 30,000 shares and an additional certificate for 10,000 shares, and the latter certificate for 10,000 shares was delivered to Dr. Dohme on December 24th, and at the same time he directed the voting trustees to distribute the 30,000 shares represented by the other certificate in the following manner:

    18,000 shares to H. M. Preston as and for compensation in effecting the transaction, and the balance was to be delivered to the petitioner and his wife, E. L. Beecher, Research Engineer of The Gabriel Company, and L. W. Klein, its Secretary, the petitioner, brother-in-law of Dr. Dohme, and his wife, to receive 9,000 shares and Beecher and Klein each to receive 1500 shares. (Finding R. 139—Stip. R. 18, 19)

18. That subsequently in order to satisfy a disgruntled stockholder, Preston & Company contributed 320 shares, the petitioner 240 shares and Klein and Beecher 40 shares each, which were optioned at $4.00 per share and subsequently sold under said option, which left 18,000 shares for distribution to H. M. Preston & Company, 8760 to the petitioner and 1460 shares each to Klein and Beecher, and actual distribution was made accordingly on February 23rd, 1937, and the petitioner's shares were issued to him and his wife jointly. (Stip. R. 18, 19—Finding R. 139)

19. That the petitioner is the brother-in-law of Dr. Dohme and their relations as well as those between Dr. Dohme and Beecher and Klein were unusually pleasant and friendly. (Finding R. 139—Pet. test. R. 85)

20. That Dr. Dohme, the donor, intended such shares to the petitioner, Beecher and Klein to be gifts, even though Dr. Dohme hoped that it would be an incentive to them to remain with the business and do their utmost for it. (Third answer R. 123—Dr. Dohme deposition—last answer R. 124 Dohme deposition—first answer R. 125 Dohme deposition —last answer R. 126 Dohme deposition—second answer R. 132 Dohme deposition—third answer R. 132 Dohme deposition—first and second answers R. 133 Dohme deposition—Batterman test. R. 77)

21. The petitioner, John J. Batterman, never owed Dr. Dohme any money, nor did Dr. Dohme ever owe petitioner any money, nor did Mrs. Batterman ever owe Dr. Dohme any money, nor did Dr. Dohme owe anything to any of the family. (R. 91 —Finding R. 140)

22. Mrs. Batterman was never employed by either Dr. Dohme or The Gabriel Company, and neither were ever indebted to her or to the petitioner. (R. 91—Finding R. 140)

23. The petitioner had no agreement with The Gabriel Company, or Dr. Dohme, whereby he should re-

ceive any compensation in any form whatsoever based upon the conclusion of the reorganization. (R. 91—Batterman test.)

24. During 1936 the petitioner, Klein, Beecher and H. M. Preston & Company, recipients of the 30,000 shares of Dr. Dohme's 40,000 shares, entered into an oral agreement that in any one year none would sell more than one-fifth of the shares that he would receive, and the petitioner entered into this agreement because he felt that heavy sales would depress the market but he was willing to enter the arrangement in the hope that the interests of all might be maintained. (Finding R. 141—Batterman test. R. 86, 87, 88)

25. That The Gabriel Company had issued an option to Shields & Company, a brokerage firm of New York, to purchase 20,000 shares of the new stock at $4.00 per share and the option was not exercised by Shields & Company although during said period of the option the stock was sold for as high as 6.125 per share. (Exhibit "G," R. 46) (Finding R. 141)

26. That the petitioner in his 1938 income tax return reported the sale of $1334.44 of said shares under Schedule F, as capital gain; that the reporting in said tax return was induced by an Internal Revenue Agent's negotiations over whether said shares should be returned in the 1937 income tax return. (Meaden test. R. 104 to 107, excluding answers stricken from the record by the Tax Court of the United States.)

27. Neither The Gabriel Company nor Dr. Dohme ever made any deductions on their tax returns or from their income on their personal and corporate books, respectively, for any compensation paid to the petitioner, or any other donees.

28. That the donees of said 30,000 shares of stock received from Dr. Dohme agreed between themselves that none of such holders would sell more than 20% of their stock in any one year, and that said 30,000 shares of stock represented approximately

14% of the issued and outstanding stock of The Gabriel Company. The purpose of this parol understanding was to prevent the depressing of the market on said stock which agreement as between Preston & Company and its associates, the petitioner, Beecher and Klein was carried out and fully performed.

29. In December, 1941 respondent mailed to petitioner his notice of determination of the income tax deficiency for the year of 1937 which is in controversy herein, appeal from said determination being thereupon taken by the petitioner to the Board of Tax Appeals. (R. 1)

30. On April 1st, 1943 the Board sustained respondent's determination of petitioner's liability and entered judgment in favor of respondent and against petitioner for the amount of the said deficiency in controversy for the year of 1937, to-wit: $10,810.78. (R. 136)

31. On June 11th, 1943 petitioner filed his petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, together with statement of points involved.

32. On February 25th, 1944 the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the Board of Tax Appeals without opinion.

(c) Questions Presented.

1. Was the transfer of 9,000 shares of stock of an Ohio corporation from the owner to his brother-in-law and sister-in-law compensation taxable under Section 22(a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, or was it an exclusion from gross income as a gift under 22(b) (3) of the Revenue Act of 1936, c. 690, 49 Stat. 1648?

   Petitioner contends that said 9,000 shares of stock received by him and his wife from Dr. Dohme was a gift and not taxable income.

2. Was the Commissioner warranted in assessing a deficiency against the petitioner on a basis of the

stock market price of free, unrestricted stock, as of the date of transfer, whereas petitioner's stock was subject to an agreement between certain parties holding 14% of all issued stock, that none would dispose of more than 20% of their holdings per annum?

Petitioner contends that by reason of said parol agreement not to dispose of more than 20% of their respective holdings in each year, which agreement was fully performed, that the price was so restricted that if taxable income, it should only be taxed in the years sold.

3. Is the petitioner, because of the highly speculative character of the stock during the year in question, entitled (if said stock is compensation) to return and be subject to tax on that portion of said stock sold in each year, or must the petitioner return as income from compensation said shares at the stock market price on the day of transfer regardless of restrictions and the speculative value of said stock?

Petitioner contends that because of the highly speculative value of the stock that under the doctrine expressed in *Tex-Penn Oil Company v. Commissioner*, 300 U. S. 481, 57 Sup. Ct. 567, the stock should only be taxed, if taxable income, in the years in which the stock was sold, it being incapable with reasonable certainty to know the fair market value as of the date of transfer.

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

In holding and deciding—

1. That the transfer of 9,000 shares of stock by the shareholder of a corporation to his brother-in-law and sister-in-law constituted taxable income, and that such transfer was not a gift exempt therefor under Section 213(b) (3) of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

2. That petitioner was not restricted as of date of transfer in the disposition of more than 20% of such holdings per annum.
3. That the petitioner's stock should be valued at the stock market price as of date of transfer, even though a highly speculative stock.
4. Said Circuit Court of Appeals decided federal questions in a way probably in conflict with applicable decisions of this court. Said decision of the Circuit Court of Appeals is inconsistent with decisions of this Court and other federal courts in analogous cases. Such cases being numerous, will be referred to in petitioner's brief which is annexed hereto.
5. That the conclusions of the Tax Court in arriving at its decision were the result of reasons which existed in the case of *Commissioner v. American Dental Company*, 87 Sup. Ct. (Law Ed.) 574, which the Supreme Court of the United States refused to support as proper reasons for the Tax Court's conclusions.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this Court for its review a full and complete transcript of the record and proceedings in this cause No. 9609 on the docket of said Circuit Court and entitled there as in this petition, to the end that this cause may be reviewed and the rights of the parties determined by this Court according to law, and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law and your petitioner will ever pray.

JOHN J. BATTERMAN, *Petitioner,*
by SYDNEY A. DAVIES,
His Counsel.

Dated: May 2, 1944.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. . . . . .

JOHN J. BATTERMAN,
Petitioner,

vs.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The Circuit Court of Appeals for the Sixth Circuit affirmed the opinion of the Board of Tax Appeals (now the Tax Court of the United States) without opinion.

The Memorandum Findings of Fact and Opinion of the Board of Tax Appeals will be found at pages 136-149 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13th, 1925, 43 Stat. 938 United States Code, Title 28, Section 347(a).

The judgment of the Circuit Court of Appeals was entered on February 25th, 1944. (R. 163.) Petitioner is allowed three months from February 25th, 1944 within which to file his petition for writ of certiorari. (Act of February 13th, 1925, c. 229, Section 8(a, b, d) 43 Stat. 940, United States Code, Title 28, Section 380, *Gipsy Oil Company v. Escoe,* 275 U. S. 498.)

A motion to say mandate was filed and allowed by the United States Circuit Court, Sixth Circuit, on April 5th, 1944.

STATEMENT OF THE CASE AND OF QUESTIONS INVOLVED.

The petition for writ of certiorari contains a statement of the case, the questions involved and the contentions of the petitioner. The findings of fact and the opinion of the Board of Tax Appeals appear on pages 136 to 149, both inclusive of the record.

The Circuit Court of Appeal for the Sixth Circuit affirmed the Board of Tax Appeals without opinion.

STATUTES INVOLVED.

The statutes involved are as follows:

Section 22(a) and (b) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, provides as follows:

"Sec. Gross Income.

(a) General Definition.—'Gross Income' includes gains, profits and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

"(3) Gifts, Bequests, and Devises.—The value of property acquired by gift, * * * (but the income from such property shall be included in gross income);"

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in holding and deciding—

1. That the transfer of 9,000 shares of stock by the shareholders of a corporation to his brother-in-law and sister-in-law constituted taxable income, and that such transfer was not a gift exempt therefor under Section 213(b)(3) of the *Revenue Act* of 1936, c. 690, 49 Stat. 1648.
2. That petitioner was not restricted as of date of transfer in the disposition of more than 20% of such holdings per annum.
3. That the petitioner's stock should be valued at the stock market price as of date of transfer, even though a highly speculative stock.
4. That the conclusions of the Tax Court in arriving at its decisions were the result of reasons which existed in the case of *Commissioner v. American Dental Company*, 87 Sup. Ct. (Law Ed.) 574, which the Supreme Court of the United States refused to support as proper reasons for the Tax Court's conclusions.

ARGUMENT.

As to petitioner's contention that the transfer of 9,000 shares Class "A" common stock of The Gabriel Company from Dr. Alfred R. L. Dohme to the petitioner and his wife was a gift and, therefore, the value thereof should not be considered taxable income, the petitioner relies chiefly upon the case of *Helvering, Commissioner v. American Dental Company*, 87 Sup. Ct. (Law Ed.) 574, which decision was rendered three days after the Board of Tax Appeals' opinion in this case was released and filed.

Dr. Alfred R. L. Dohme was the donor, and John J. Batterman, petitioner herein, the donee of the 9,000 shares of Class "A" stock of The Gabriel Company here involved.

The Gabriel Company (a corporation) was not instrumental in any way in instituting this transaction, nor

were the assets of that corporation affected one iota by the transfer. Dr. Dohme was the owner of such shares and gave them to the petitioner. The corporation did not engage in the transaction in any way, and as a matter of fact took no deduction in its tax returns, nor from its income or assets on the books for compensation because of the transfer of such capital stock to the petitioner from Dr. Dohme.

The uncontroverted evidence in this case clearly supports the statement that neither the petitioner, John J. Batterman, nor his wife, Elenora C. Batterman, were at any time employed by, nor did they perform any services whatsoever for Dr. Alfred R. L. Dohme, nor were there any services contemplated to be performed for and in behalf of Dr. Dohme by the petitioner or his wife. Further, Dr. Alfred R. L. Dohme was not indebted to petitioner, or petitioner's wife, in any account whatsoever. (R. 140.)

Petitioner realizes that in consideration of his petition for writ of certiorari that he is bound by the findings of fact of the Board of Tax Appeals (now the United States Tax Court), but is not bound by the conclusions reached by the Board of Tax Appeals from such facts.

In the instant case the Board of Tax Appeals made the following finding of fact:

> "Dr. Dohme was at first reluctant to agree to accept only 10,000 shares of such a large issue, but after discussing the matter with his wife concluded that his present holdings were of little value and that under the plan the 10,000 new shares might come to have some value in the future. Accordingly he consented to the proposal and gave to the petitioner his proxy to vote the Class 'B' shares in its favor. At the time of the discussion it was agreed that provision would also be made for a distribution to the petitioner and other key-men in the company out of the 40,000 shares to be issued to Dr. Dohme." (R. 137, 138.)

Further, the Board of Tax Appeals' findings of fact contain the following:

"The petitioner's personal associations with Dr. Dohme were unusually pleasant. The latter considered the petitioner, Beecher and Klein to be key-men of The Gabriel Company. It was his wish that all of them be given a financial interest in the corporation through the distribution among them of whatever number of shares remained out of his block of 40,000. Through his experience with another corporation in which he was interested he had come to believe that the ownership by its executives of a financial interest would act as an inducement to them to take more than a normal interest in the affairs of The Gabriel Company. He wanted the petitioner to remain in its employ and felt that the ownership of stock would be an incentive to him and to the other two men to continue to devote their best efforts to the company. It was his hope that the petitioner's continued association with it might enable the company to get on its feet and eventually give some value to his holdings. The foregoing were all factors motivating his decision that stock should be given to the petitioner and to Beecher and Klein." (R. 139, 140.)

The Board of Tax Appeals' findings of fact further contain the following:

"That the petitioner was a brother-in-law of Dr. Dohme is of very slight weight on the question of gift, for Klein and Beecher also received stock and they had no family connection with Dr. Dohme.

"There were other factors motivating Dr. Dohme's decision. He felt that the petitioner, Beecher and Klein were key-men in The Gabriel Company and wanted them to continue in their association with it. According to Dr. Dohme's testimony the petitioner was to make such use of the stock as in his judgment would serve the best purposes among the key-men of the company. He felt that a financial interest in its affairs would encourage them to stay and to take more than a normal interest in the affairs of the corporation. Those are motives associated with personal gain, rather than with beneficence. No extended review of the evidence is here necessary. We are convinced that Dr. Dohme's

> principal thought in consenting to the plan for re-adjustment of the capital structure of the corporation was the hope of ultimate betterment of his own financial position. That the petitioner too would personally benefit, although gratifying to him, was an incidental and secondary consideration. We think Dr. Dohme's interest in the re-organized company and the retention of the key-men therein clearly distinguishes this case from *Bogardus v. Commissioner, supra,* principally relied on by the petitioner." (R. 143, 144.)

Said findings of fact of the Board of Tax Appeals further contain the following:

> "The petitioner argues that in every case in which a bonus payment has been held taxable to the recipient, a debt or legal obligation existed which was liquidated by the payment. We disagree." (R. 144.)

Now in the light of the aforesaid findings of fact let us examine the holding of the Board of Tax Appeals in the case of *Commissioner v. American Dental Company, supra.* The Board of Tax Appeals, 44 B. T. A. (F) 425, 428, held as follows:

> "No evidence was introduced to show a donative intent upon the part of any creditor. The evidence indicates on the contrary that the creditor acted for purely personal reasons and did not forgive the debt for altruistic reasons, or out of pure generosity."

The *American Dental* case was one in which the chief issue was whether or not the forgiveness of indebtedness by creditors of the American Dental Company constituted a gift or taxable income, the Board of Tax Appeals holding that certain creditors forgave the company indebtedness to them for the purpose of putting the company upon its feet so that they would benefit by future business from the company. Now, the Supreme Court of the United States said in the *American Dental* case opinion, released a few days after the decision in this case, the following:

"With this conclusion we cannot agree. We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon an application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence and without judicial review the test to be applied to facts to determine whether the result is or is not a gift. The fact that the motives leading to the cancellations were those of business, or even selfish, if it be true, is not significant. The forgiveness was gratuitous. A release of something to the debtor for nothing is sufficient to make the cancellations here gifts within the statute."

It is readily discernible that the Supreme Court in *The American Dental Company* case over-ruled the conclusions of the Board of Tax Appeals, which conclusions were the same conclusions as arrived at in the instant case at bar. In both cases the Board of Tax Appeals held that reasons other than altruistic reasons led to the making of the gift, and that, therefore, it was taxable income, and in the *American Dental* case the court stated—

"The fact that the motives leading to the cancellations were those of business, or even selfish, if it be true, is not significant. The forgiveness was gratuitous. A release of something to the debtor for nothing is sufficient to make the cancellations here gifts within the statute."

The above citation from the Supreme Court's opinion in *The American Dental* case could be paraphrased and made applicable to the instant case by merely changing the word "forgiveness" to "transfer of shares," and by changing the word "cancellations" to "transfer of shares."

Applying the reasoning of the United States Supreme Court in *Helvering, Commissioner v. American Dental Company, supra,* certainly there is no finding in this case which points to the Tax Court's conclusion that either Mr. or Mrs. Batterman gave up anything, either in the way of

work, time or other thing of value for the stock received from Dr. Dohme. The Tax Court in this case has done exactly that which the Supreme Court of the United States says they are prohibited from doing, viz.: "to determine at will or upon evidence, and without judicial review the test to be applied to facts to determine whether the result is or is not a gift."

The Tax Court in the instant case has determined that the motive for the gift to Mr. and Mrs. Batterman was that of a business nature. The Supreme Court virtually said—The motives leading to the transfer of the shares to Mr. and Mrs. Batterman, by Dr. Dohme even though for business reasons is not significant. The gift was made gratuitously. Certainly Dr. Dohme released something to Mr. and Mrs. Batterman for nothing, and as his own testimony expressly states this was the result of his wanting to "be helpful" to Mr. and Mrs. Batterman. (R. 124.) Dr. Dohme was under no direct obligation in any way to Mr. Batterman. He had taken Mr. Batterman from Boston where he had conducted an unsuccessful business and was not a wealthy man. (R. 126.) Mr. Batterman's contract still had approximately four years to run (Ex. "C," R. 23) so that the purpose could not have been to maintain Mr. Batterman's connection with The Gabriel Company.

The reorganization in no way affected Mr. Batterman's employment contract then in force. (Ex. 9, R. 45.) Dr. Dohme was a wealthy man and had never made any gifts to Mr. and Mrs. Batterman heretofore (R. 140), but feeling that he was not giving away a great amount (R. 129), and undoubtedly feeling that Mr. Batterman having a stock interest in the company would weld him a little closer to the company's affairs after the reorganization (R. 126), is apparent from the Board's findings, and there certainly is no additional motive that could have prompted the gift from Dr. Dohme to Mr. and Mrs. Batterman, excepting that he desired to aid the petitioner and his wife.

Furthermore, we point out that Mrs. Batterman was never in any manner whatsoever connected with the company so that the argument to the effect that the motive was selfish cannot apply to Mrs. Batterman, and certainly Dr. Dohme did not have two separate purposes in mind in making the transfer of the stock to them jointly, that is to say, he would not have one purpose for Mrs. Batterman and one purpose for Mr. Batterman. If he wanted Mrs. Batterman to have a joint interest in the stock it must have been a gratuitous motive that prompted the gift to her. Dr. Dohme may have thought that giving the gift to them jointly would have made Mr. Batterman feel a little different toward the company, which had just been reorganized and which he was then heading and would head for an additional four years at least, but as the Supreme Court has stated in the *American Dental Company* case, *supra,* this fact does not take it out of the gift class.

Applying the rule laid down by the Supreme Court in the *American Dental Company* case, *supra,* the motives leading to the transfers are not important. They may even be business motives or selfish motives.

In discussing the definition of the word "gift" in the *American Dental Company* case, the Supreme Court said—

> "Gifts, however, is a generic word of broad connotation taking coloration from the context of the particular statute in which it may appear. Its plain meaning in its present setting denotes, it seems to us, the receipt of financial advantages gratuitously."

In view of the fact that the same statute was under consideration in the *American Dental Comuany* case as is under consideration in the instant case it would seem to make the definition applicable.

The Supreme Court of the United States clarified the conflicting prior decisions in the lower courts in the case of *Bogardus v. Commissioner,* 302 U. S. 34 (19 A. P. T. R. 1195), *supra,* in which decision the court held that a be-

stowal of money, or something of value, cannot be, under the statute, both a gift and a payment of compensation. The Court had this to say on the subject on page 39 of Volume 302 U. S.:

> "The statute definitely distinguishes between compensation on the one hand and gifts on the other hand, the former being taxable and the latter free from taxation. The two terms are, and were meant to be, mutually exclusive; and a bestowal of money cannot, under the statute, be both a gift and a payment of compensation."

And, again on page 40 of the opinion—

> "If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A claim that it is a gift presents the sole and simple question of whether its designation as such is genuine or fictitious—That is to say, whether, though called a gift, it is in reality compensation. To determine that question we turn to the facts, which we have already detailed."

The facts in the case of *Bogardus v. Commissioner, supra,* are similar to those in the case at bar, and where such facts differ the facts in the case at bar are much stronger in favor of the petitioner than in the *Bogardus* case, *supra.*

In the case at bar, the petitioner was not at any time employed by Dr. Dohme, the donor, nor did a relation of debtor and creditor exist between them. Further, Dr. Dohme was under no legal, or other obligation to pay the petitioner, or transfer to him anything of value as salary, compensation or consideration of any kind. The donor and the petitioner were brothers-in-law and very friendly. Dr.

Dohme, the donor, knew and felt that the petitioner had received full compensation for the services rendered by him as an employee of The Gabriel Company, and did not intend that the transfer of the shares of stock here involved, be additional salary, bonus, or compensation for services rendered, or to be rendered by petitioner to such donor. As a matter of fact there was no contract, agreement or understanding between donor and the petitioner by virtue of the terms of which the donor was to transfer 9,000 shares of this stock to the petitioner.

In light of the *American Dental Company* case, *supra*, the transfer so made by Dr. Dohme to the petitioner was entirely voluntary, wholly without consideration other than a hope that the Company would do better financially and in this way aid his own holdings, and was purely a gift.

Every decision, both of the United States Tax Court and of the courts, specifically point out in cases holding that a delivery of something of value constituted compensation, that a debt or legal obligation existed which was liquidated by the delivery of the particular asset. In the instant case at bar, the only employer-employee relationship existing was that between the petitioner and The Gabriel Company, covered by written contract of November, 1931 and November, 1936 (Petitioner's Exhibits "B" and "C" Stf.) and it is uncontroverted that the petitioner's full and complete obligations to the company were set forth in said contracts and that said contracts were fulfilled both on the part of the company and the petitioner. The petitioner owed the duty to devote his full time and ability to the furtherance of the interests of The Gabriel Company and there has been no contention made that he did not furnish to the company his full time and his best and ablest ability in the management and operation of the company and in the fulfillment of his duties as an officer and director of the company, nor is there any claim here presented that the petitioner did not receive a full and ample salary for such

services. So pray tell, what further could the petitioner have possibly done to have earned any additional compensation from the company or any one else.

The company was not legally obligated to pay him anything additional because the best that he had was to be given to the company under his written contracts for which the company was to pay him a stipulated annual salary, which was paid. So certainly petitioner owed The Gabriel Company nothing, and they owed him nothing which could possibly be construed as compensation.

The Board of Directors of the company never by any resolution recognized any additional compensation due to petitioner, nor was any obligation to petitioner ever set up on the books of the company. In short, they owed him nothing beyond the compensation to be paid under said respective contracts, and this was at all times paid and is not involved in the present controversy. Therefore, The Gabriel Company owed petitioner nothing and having paid him nothing certainly cannot be claimed to have paid him said 9,000 shares as compensation, nor did Dr. Dohme pay any debt of The Gabriel Company.

Now, let us consider the relationship of Dr. Dohme who made the gift to his brother-in-law and sister-in-law, to-wit: Mr. and Mrs. Batterman. It is admitted and uncontroverted testimony that neither Mr. or Mrs. Batterman were indebted to Dr. Dohme, or that Dr. Dohme was in any manner obligated to either Mr. or Mrs. Batterman. Now, if this gift should be held to be compensation, it must likewise be compensation in payment of some debt or obligation for services rendered either in the past or the future. What services did petitioner ever render Dr. Dohme? The Commissioner contends that the reorganization of the company by petitioner was of benefit to Dr. Dohme. Remember, no contract ever existed between Dr. Dohme and the petitioner with respect to the payment of any compensation.

Now, let us analyze Dr. Dohme's position prior to the reorganization of The Gabriel Company. There was outstanding 198,000 shares of non-voting Class "A" common stock which was widely held and listed upon the New York Exchange. This "A" Common had represented the company's original capital which had been almost exhausted except for plant, machinery and equipment. The company had very little working capital, but Dr. Dohme owned 2,000 shares of "B" Common Stock which held the sole voting rights. In the reorganization Dr. Dohme surrendered his sole, absolute and complete control of the company and received therefor 10,000 shares of the "A" Common Stock, which by the reorganization had been increased from 198,000 to 300,000 and which had been given voting rights. So that where prior to the reorganization Dr. Dohme owned the complete voting shares, which even under the reorganization plan were worth 40,000 of "A" shares, and by control of which 2,000 shares he could have liquidated the company.

So we found Dr. Dohme surrendered his 2,000 shares, losing control of the company, and obtained only 22,000 shares out of a possible 300,000 and the only benefit that was received was a benefit to the company, namely the sale of certain shares by which the company obtained additional working capital or around $75,000.00. Obviously, Dr. Dohme was personally far worse off financially after the reorganization than he was prior to the reorganization, and this particularly in view of the fact that he personally, out of his own pocket and from said shares, paid the cost of the reorganization amounting to 18,000 shares of his stock. Why did Dr. Dohme do such a foolish thing? The answer is obvious. He is an extremely wealthy man and he did not desire to liquidate the company and cause his brother-in-law, the petitioner, to be out of work and cause the liquidation of the company, which also would have resulted in the loss of employment to Mr. Beecher and Mr. Klein whom he

had come to know. By the testimony in his deposition which shows that he did not consider the stock either before or after reorganization of much value and as long as he could, by paying the reorganization expense in stock to H. M. Preston & Company to the extent of 18,000 shares, keep the company afloat and at the same time give his brother-in-law and his two close friends continued employment and an interest in the company, which they previously had not had, he desired to do this rather than to liquidate the company, even though the reorganization meant that he personally would be worse off financially after the completion thereof, but he had assurance by Exhibit C that if the reorganization was effected and the company kept afloat, his aging brother-in-law would have a job and an interest in the company. This, unquestionably, was a motivating reason for Dr. Dohme consenting to the reorganization and the payment of the expenses thereof and making the gifts of stock in the reorganized company to his brother-in-law, his sister-in-law, and his two friends, Mr. Beecher and Mr. Klein.

LAW AND ARGUMENT ON QUESTIONS 2 AND 3.

The petitioner was not to sell or dispose of the 9,000 shares received by him from Dr. Dohme as a gift any faster than at the rate of one-fifth of such holdings per year. The New York Stock Exchange price of The Gabriel Company stock fluctuated between $7.50 per share and $1.50 per share. The corporation had lost money for several years. The only shock absorbers produced up to that time were outmoded and the company was pioneering with a new shock absorber of the direct-action type, but it did not have this new shock absorber either in production or in the hands of distributors. Much work had to be done by the corporation before it could produce a saleable product which by the very nature of the corporation was the basis for its existence. The stock of The Gabriel Company was

one of the most highly speculative issues in existence, and there was a restriction on selling Mr. Batterman's stock.

The District Court of the United States (District of Mass.) handed down a decision in the case of the *State Street Trust Company v. United States of America,* 37 F. (Supp.) 846, which clearly held that no taxable gain is realized where the securities involved cannot be sold by reason of a binding agreement not to sell the same, and the securities involved are of a speculative character. The here relevant portion of the syllabus in such case is as follows:

> "No taxable gain was realized in 1930 * * * because of a binding agreement not to sell the latter stock for one year and the speculative character of the security, the shares had no 'fair value' * * * even though the stock was listed on the New York Stock Exchange and on an unrestricted basis had a market value of 'about $44 a share.' "

This case was affirmed by the Circuit Court of Appeals (First Circuit) in 1942, in the case of *United States v. State Street Trust Company,* 124 F. (2nd) 948.

See also, *Propper, et al. v. Commissioner,* 89 F. (2nd) 617, reversing 33 B. T. A. 261 and *Schuh Trading Company v. Commissioner,* 95 F. (2nd) 404.

To the same effect is the case of *Tex-Penn Oil Company v. Commissioner,* 300 U. S. 481, 57 S. Ct. 569 (18 A. F. T. R. 1174). The Supreme Court said on page 499 of the opinion as it appears in Volume 300 U. S.:

> "The court is also of opinion that the judgment must be affirmed upon the ground that in the peculiar circumstances of this case, the shares of Transcontinental stock, regard being had to their highly speculative quality and to the terms of a restrictive agreement making a sale thereof impossible, did not have a fair market value, capable of being ascertained with reasonable certainty, when they were acquired by the taxpayers.

> "In the absence of such value, the ownership of the shares did not lay the basis for the computation of a gain at the time they were received, or for a tax as of that date under the applicable statute."

The courts are positive on the point that a restriction on the sale of speculative stock "strips the stock of an ascertainable value" in the year received, hence, the gain, if any, is not then reportable.

The United States Tax Court unquestionably recognized that the stock at the value assessed represented a fictitious value, but apparently felt that it was bound by Article 22(a)-3 of Regulations 94 because we find the following quoted in the opinion of the United States Tax Court in the instant case:

> "Under article 22(a)-3 of Regulations 94, the fair market value of the stock is to be included in petitioner's income. Turning, therefore, to the question of value, we find that respondent based his determination on the price at which sales were made on the New York Stock Exchange on the day in question, and that in the week within which that day fell sales of 2,800 shares were reported by the Exchange. Petitioner's contention that that valuation is excessive looks for support to the following circumstances. The book value in December, 1936 was only $2.61 per share; his shares were subject to an agreement restricting their sale; a brokerage firm failed to exercise an option to purchase 20,000 shares at $4 per share; he argues also that the fact that the company continued to operate at a loss during the ensuing years, and that after 1937 its stock did not sell on the New York Stock Exchange at a higher price than 3⅞, supports his contention that the 1937 sales were at fictitious values.
>
> "Though book value is not without effect as indication of actual value, we think that it alone can not be taken to establish a fair market value other than that determined by the respondent, in the face of the presumption of correctness favoring his determination."

Obviously the consideration of this Court under questions presented, 2 and 3, will only be required in the event that the determination of this Court with respect to question 1 is against the petitioner. In brief, that the stock transferred to the petitioner was not compensation to him.

RELIEF REQUESTED.

The petitioner requests the following relief:

(a) That an order be entered by this Court finding and determining that the deficiency heretofore assessed against the petitioner be vacated, and that the affirmation of the United States Court be reversed on the ground that the transfer of 9,000 shares to the petitioner and his wife constituted a gift under Sec. 22(b)(3) of the Revenue Act of 1936, and that judgment be entered for the petitioner and against the respondent to such effect.

(b) That in the event the court should decide that the transfer of said shares from Dr. Dohme to the petitioner and his wife constituted compensation and, therefore, taxable income under the Income Tax Law, that the court find that the fair value thereof be indeterminable as of February 23rd, 1937 by reason of the restriction placed thereon by agreement between the parties, and the speculative and fictitious value represented by the stock market quotation, and that such shares should only be taxed at the sale price in the years in which such portion of said shares were sold.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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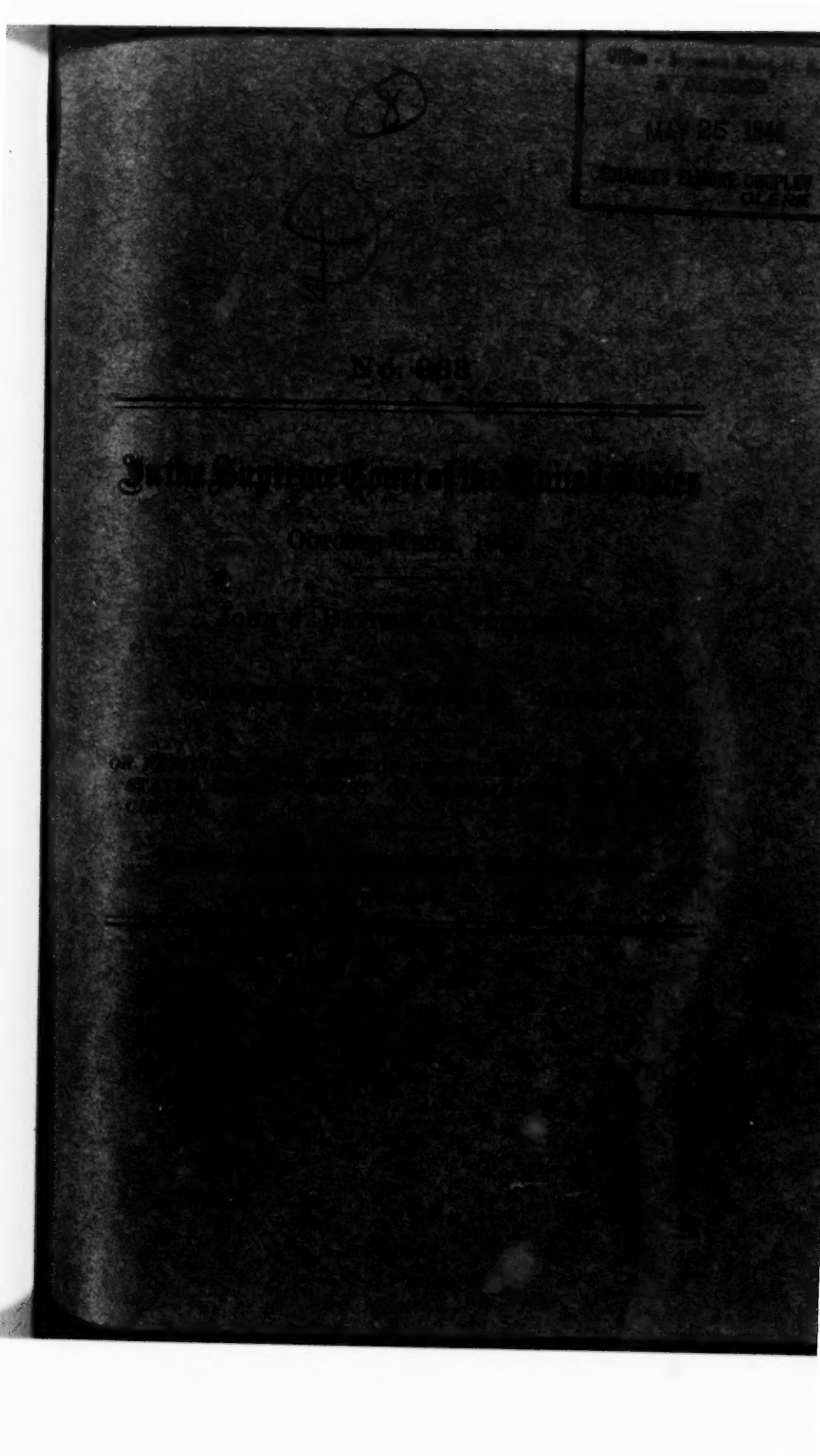

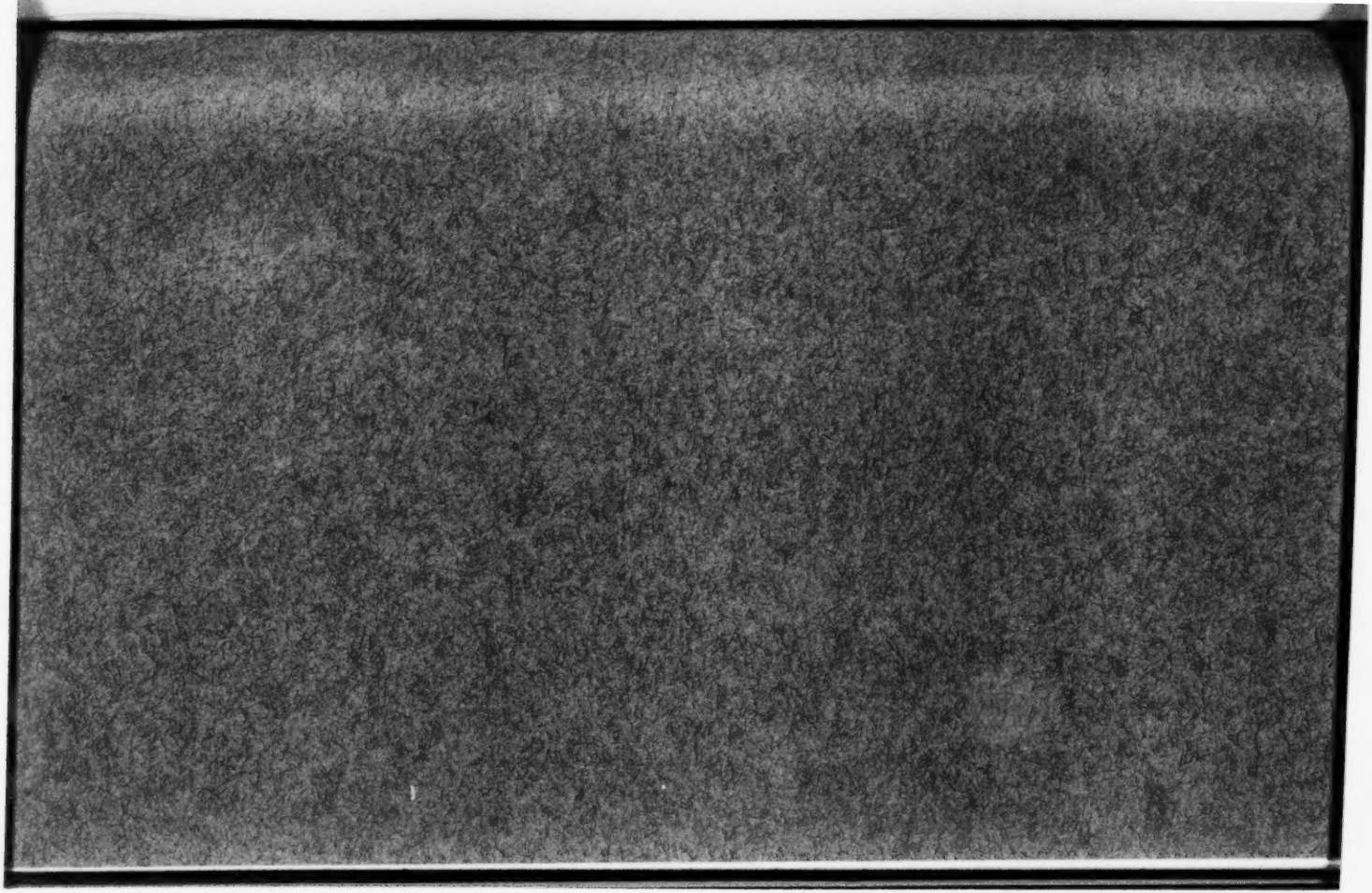

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589311—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 963

JOHN J. BATTERMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court of the United States (R. 136–149) are not officially reported. The Circuit Court of Appeals did not enter an opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 25, 1944. (R. 163.) The petition for a writ of certiorari was filed May 4, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the transfer of certain shares of stock in a corporation to the taxpayer, the president and general manager of the corporation, by an important stockholder of the corporation, was a gift exempt from income tax under Section 22 (b) of the Revenue Act of 1936.

2. Whether the value of the stock so transferred was correctly determined by the Tax Court.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> (b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 22 (a)–3. *Compensation paid other than in cash.*—If services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. * * *

STATEMENT

This matter was heard before the Tax Court of the United States on a stipulation of facts with attached exhibits (R. 15–68) and on the evidence of the parties (R. 73–134). The following statement is based on the Tax Court's findings of fact, which are not challenged by petitioner (R. 136–142).

On November 16, 1931, the taxpayer entered into an employment contract with the Gabriel Company, an Ohio corporation engaged in the manufacture of automobile shock absorbers, as assistant manager for a period of five years at an annual salary of $10,000 per year. On January 29, 1933, taxpayer was elected president and general manager of the corporation. The contract thus made, as well as election of the taxpayer to

the office of president of the corporation, was brought about by the taxpayer's brother-in-law, Dr. Alfred R. L. Dohme, who was the owner of 2,000 shares of Class B common stock of the Gabriel Company, all of its outstanding voting stock. (R. 136.) Besides the Class B voting stock there were also outstanding 198,000 shares of Class A common stock which had no voting rights (R. 137). On November 5, 1936, the taxpayer entered into a new contract as general manager of the corporation for a further period of five years at a salary of $12,500 for the first year, and $15,000 for each subsequent year (R. 136–137). The taxpayer never received from the Gabriel Company any bonus or additional compensation, exclusive of the transfer of stock here in question (R. 140).

The Gabriel Company had for several years prior to 1936 suffered operating losses and in that year was in poor financial condition (R. 137). At the instance of taxpayer, a firm of financial experts, H. M. Preston and Company, was employed to make a survey of the company's condition. This resulted in a recommendation for the alteration of the capital structure of the company by the increase of its Class A stock to 300,000 shares, and the surrender by Dr. Dohme for cancelation of his 2,000 Class B shares in exchange for 40,000 shares of the additional issue of Class A stock. The remainder of the additional Class A shares were to be sold. (R. 137.) In January, 1936, taxpayer, Dr. Dohme, and a representative

of H. M. Preston and Company, agreed that of the 40,000 shares of Class A stock thus allotted to Dr. Dohme, he should retain 10,000 shares for himself; that out of the remaining 30,000 shares, not to exceed 20,000 shares were to be issued to H. M. Preston and Company as compensation for their services in conducting the reorganization. At the same time it was agreed that out of the remainder of the 40,000 shares allotted to Dr. Dohme, a distribution should be made to the taxpayer and to other key men in the Gabriel Company. Dr. Dohme was led to accept the allotment to him of 10,000 shares, because he concluded that his present holdings were of little value, and "that under the plan the 10,000 new shares might come to have some value in the future." He gave to the taxpayer his proxy to vote his 2,000 Class B shares in favor of the proposal. (R. 137–138.)

The plan as proposed was carried into effect. Dr. Dohme's 2,000 shares of Class B stock were voted in favor of the plan under a voting trust agreement which designated the taxpayer and two members of H. M. Preston and Company as voting trustees. (R. 138.) On December 24, 1936, Dr. Dohme received a certificate for his 10,000 shares of Class A stock. At the same time he directed the trustees to distribute the remaining 30,000 shares as follows: To H. M. Preston and Company or its nominees, an aggregate of 18,320 shares; to the taxpayer and to E. L. Beecher and L. W. Klein, employees of Gabriel Company,

the balance of the 30,000 shares in such amounts as the trustees should agree. (R. 139.) H. M. Preston and Company and its nominees actually received 18,000 shares. The taxpayer proposed that the remaining 12,000 shares should be distributed 9,000 shares to himself and 1,500 shares each to Beecher and Klein. However, of the 9,000 shares allotted to the taxpayer he subsequently sold 240 shares thereof to a disgruntled stockholder of the corporation for $960, so that on the final distribution the taxpayer received 8,760 shares. These shares were issued to the taxpayer and his wife jointly, the actual distribution being made on February 23, 1937. (R. 139.)

As bearing on the motive of Dr. Dohme in the above transactions, the Tax Court found: The taxpayer's personal associations with Dr. Dohme were unusually pleasant. Dr. Dohme considered that taxpayer and Beecher and Klein were the key men in the Gabriel Company, and he desired to give to these men a financial interest in the corporation out of whatever shares remained from the 40,000 Class A stock allotted to him. Through past experience with another corporation he had come to believe that such financial interest would act as an inducement to the taxpayer and Messrs. Beecher and Klein to take more than a normal interest in the affairs of the Gabriel Company. He also wished taxpayer to remain in the employ of the Gabriel Company, and felt that the ownership of stock in the company would be an incen-

tive to the taxpayer and to Beecher and Klein to continue to devote their best efforts to the company and enable the company to repair its fortunes and eventually give some value to Dr. Dohme's own holdings. (R. 139–140.) The Tax Court specifically found (R. 140): "The foregoing were all factors motivating his decision that stock should be given to the petitioner, and to Beecher and Klein." The actual apportionment of the shares among these three was left to the taxpayer's judgment. (R. 140.)

The Tax Court also found (R. 140) that although Dr. Dohme's "security holdings were large, and although he was a moderately wealthy man," he had never made any gifts of securities to the taxpayer other than the transfer here in question. Dr. Dohme made no gift tax returns for the year here in question, nor for any other year between 1932 and 1938. The taxpayer, in his income tax returns for the years 1938 and 1939, in which years he had sold some of the stock here in question, reported in connection with such sales, under the heading of "Cost," "No Cost—received for services rendered." (R. 140.) In its opinion (R. 147) the Tax Court said, "We conclude that the 8,760 shares of stock, and the proceeds of the sale of 240 additional shares, were received by the petitioner [taxpayer] as additional compensation."

As bearing on the value of the stock received by taxpayer, the Tax Court found (R. 141): In

the years 1935 to 1939, inclusive, the Gabriel Company sustained operating losses. In December, 1936, preceding the final transfer of the stock here in question, the stock had a book value of $2.61 per share. In the years 1935–1937 the stock of the Gabriel Company sold on the New York Stock Exchange at prices varying from a low of ⅞ in 1935 to a high of 7½ in 1937. On February 23, 1937, when the stock here in question was actually distributed to the taxpayer, sales of Gabriel Company stock were made on the New York Stock Exchange at 5⅜.

The Tax Court also found (R. 141) that the taxpayer, Messrs. Beecher and Klein, and H. M. Preston & Company, had "orally entered into what the petitioner termed a 'gentlemen's agreement' that in any one year each would try not to sell more than one-fifth of the shares he would receive." In its opinion (R. 148) the Tax Court stated, "Obviously, such evidence will not justify a holding that a binding contract was made." The Tax Court also found (R. 141) that a New York brokerage firm was granted an option to purchase 20,000 shares of Gabriel Company stock at $4 a share but never exercised the option. As to the value of the stock received by the taxpayer the Tax Court in its formal findings specifically found (R. 141):

> The 8,760 shares of The Gabriel Company stock issued to petitioner had a fair market value on February 23, 1937, of $5.375 per

share, amounting in the aggregate to $47,085.

The Tax Court concluded that this amount should have been included in petitioner's taxable income for 1937, and found a deficiency in the tax paid for that year (R. 149). The decision of the Tax Court was affirmed by the Circuit Court of Appeals without opinion (R. 163).

ARGUMENT

1. Petitioner contends that the stock in question was a gift exempt from income tax. The Tax Court found that it constituted compensation for services (R. 147). This finding is supported by the evidence that the stock was distributed to petitioner and other officials of the company (who were not related to Dr. Dohme) in the hope that this might increase the value of the stock retained by Dr. Dohme, as well as by his failure to file a gift tax return covering the transfer of the stock and by petitioner's statement on his 1938 and 1939 income tax returns that his shares were "received for services rendered" (R. 140, 113, 119). In *Bogardus* v. *Commissioner,* 302 U. S. 34, upon which petitioner relies, the opinion holding a payment to be a gift [1] emphasized the absence of "the incentive of anticipated benefit of any kind," and that the disbursements were not made by stockholders "still interested" in the success of the

[1] As to the present authority of the *Bogardus* case, see *Dobson* v. *Commissioner,* 320 U. S. 489, 494n, 498n, rehearing denied, 321 U. S. 231.

company and in the maintenance of the good will and loyalty of the employees (p. 41). Here the payment to petitioner was made by a stockholder having a substantial interest in the success of the company, for the very reasons lacking in the *Bogardus* case.

The decision below is unlike *Helvering* v. *American Dental Co.*, 318 U. S. 322, which petitioner claims to be in conflict. That case involved a forgiveness by creditors, and the Court indicated that compensation cases presented a distinct problem. The Court referred (p. 327) to the "narrow line between taxable bonuses and tax free gifts * * *," and cited with apparent approval *Noel* v. *Parrott*, 15 F. 2d 669 (C. C. A. 4th), certiorari denied, 273 U. S. 754, as approved in *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 730, which held that payment for services, even though entirely voluntary and without legal obligation, constituted taxable income.

2. The determination of value was based upon the price at which sales were made on the New York Stock Exchange on the day in question (R. 147). This is in accordance with a requirement of the Regulations that market value be used (Article 22 (a) (3), *supra*), and is clearly sufficient to support the decision (*Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37) unless some adjustment should be made, as in *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, because of a so-called restrictive agreement.

The only evidence with regard to a restriction is taxpayer's own testimony that a gentlemen's agreement existed between himself and the other distributees to "try in case of necessity not to sell more than about one-fifth part of the total amount that each of us had in any one year" (R. 147–148). The Tax Court properly found that this did not amount to a binding agreement and therefore disregarded it.

In this situation taxpayer's reliance upon cases where the restrictive agreement made sales impossible is misplaced. Moreover, the so-called agreement was entered into voluntarily by the distributees; no restriction was forced upon the taxpayer by others as in the cases cited.

CONCLUSION

There is no conflict between the decision below and the decisions of this Court. The decision below is correct, and the petition for certiorari should be denied.

Respectfully submitted.

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